J Raju s/o M Kerpaya v Perwira Habib Bank (M) Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–346 OF 1995
ZALEHA ZAHARI J
9 AUGUST 2000

Legal Profession *— Practice of law — Counsel affirming affidavit on behalf of client — Objection, whether formal notice must be given to counsel — Whether counsel may affirm affidavit in support of application — Whether counsel precluded thereby from acting for party — Whether counsel likely to be embarrassed*

The defendant had in separate proceedings obtained an order for sale of the plaintiff's property and consequential relief. The plaintiff instituted the present proceedings to, inter alia, set aside the order for sale. The defendant by summons filed an application to strike out the plaintiff's action ('the first application'). However, the summons failed to state the particular provision under O 18 r 19(1)(a) to (d) of the Rules of the High Court 1980 ('the RHC') by which the defendant sought to strike out the action. Realizing this, some three years later and four days prior to the hearing of the first application, counsel for the defendant filed a further application ('the second application') to amend the first application. The second application was supported by an affidavit affirmed by counsel for the defendant. She deposed to the fact that the failure to state the particular provision under which the first application was made was a mere typographical error. She sought leave of the court to permit the amendment of the first application so that it was more complete and detailed. Counsel for the plaintiff argued that the more appropriate action was for the defendant to withdraw the first application and to file it afresh. The senior assistant registrar allowed the second application and ordered the first application to be amended accordingly. The plaintiff appealed. Before the court, counsel for the plaintiff also raised a preliminary objection to the presence of counsel for the defendant on the grounds that, having deposed to an affidavit for the defendant, she was now a material witness for the defendant.

Held, dismissing the plaintiff's preliminary objection and appeal:

(1) If counsel for the plaintiff was desirous of objecting to the continued presence of counsel for the defendant, formal notice should be given of his intention to do so. Where counsel has been threatened with a reference to the Bar Council if she does not withdraw a separate application in these proceedings, to say that she is 'deemed' to have had notice of the preliminary objection in the present application is extremely misleading (see p 13F–H).

(2) The affidavit and two further affidavits affirmed by counsel for the defendant were but an explanation as to what had transpired in proceedings in which she herself was present. As she had personal knowledge as to what transpired in this case from its inception,

she was the only one who could affirm the affidavit in support of the second application (see p 14B–D).

(3) The mere fact that counsel for the defendant affirmed an affidavit in support of an application by the defendant would not per se disqualify her from acting as counsel in the case. Counsel are clearly competent to testify to facts of which they have personal knowedge. It is not in all cases a breach of professional ethics for counsel to affirm an affidavit. The party raising the preliminary objection must provide sufficient material to show that counsel is a witness on a material issue. The plaintiff had failed to do this (see p 14H–I).

(4) It is settled law that a party must specify under which particular para of O 18 r 19(1) (a) to (d) of the RHC he is relying on in an application to strike out. This is especially so as no evidence is admissible for an application made under r 19(1)(a) of the RHC. The first application was thus liable to be struck out. Having realized this, albeit at the eleventh hour, the defendant was not precluded from amending the first application. The omission was curable as it only sought to clarify and make the first application more complete. The plaintiff could be sufficiently compensated in costs for any prejudice suffered (see p 16B–E).

(5) The relevant provision for amendment to pleadings is O 20 r 5 of the RHC whereas for an amendment of an application the relevant provision is O 32 r 2(2) of the RHC. Thus the authorities relating to amendment of pleadings are not relevant where the application is merely to amend an application (see p 15F–G).

[Bahasa Malaysia summary

Dalam prosiding berasingan defendan telah memperolehi satu perintah jualan hartanah plaintif dan relief berbangkit. Plaintif memulakan prosiding ini, antara lain, untuk mengetepikan perintah jualan tersebut. Defendan melalui saman memfailkan satu permohonan untuk membatalkan tindakan plaintif ('permohonan pertama'). Walau bagaimanapun, saman tersebut gagal menyatakan peruntukan tertentu di bawah A 18 k 19(1)(a) hingga (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang mana defendan ingin membatalkan tindakan itu. Apabila sedar tentang hal ini, hampir tiga tahun kemudian dan empat hari sebelum permbicaraan permohonan pertama, peguam bagi pihak defendan memfailkan satu permohonan lanjut ('permohonan kedua') untuk meminda permohonan pertama. Permohonan kedua disokong oleh satu afidavit yang diikrarkan oleh peguam bagi pihak defendan. Beliau mendepos kepada hakikat bahawa kegagalan untuk menyatakan peruntukan tertentu di bawah mana permohonan pertama dibuat cumalah satu kesilapan tipografi. Beliau memohon kebenaran mahkamah untuk membenarkan pindaan permohonan pertama supaya ia lebih sempurna dan terperinci.

Peguam bagi pihak plaintif berhujah bahawa tindakan yang lebih wajar adalah supaya defendan menarik balik permohonan pertama dan failkannya lagi sekali. Pendaftar membenarkan permohonan kedua dan memerintahkan supaya permohonan pertama dipinda sewajarnya. Plaintif merayu. Di hadapan mahkamah, peguam bagi pihak plaintif juga membangkitkan bantahan permulaan terhadap kehadiran peguam bagi pihak defendan atas alasan bahawa, selepas mendepos kepada afidavit untuk defendan, beliau kini seorang saksi material bagi pihak defendan.

Diputuskan, menolak bantahan permulaan plaintif dan rayuan:

(1) Sekiranya peguam berhasrat membantah terhadap kehadiran berterusan peguam penentangnya, notis rasmi hendaklah diberikan tentang niatnya untuk berbuat demikian. Di mana peguam telah diugut dengan satu rujukan kepada Majlis Peguam sekiranya beliau tidak menarik balik permohonan berasingan dalam prosiding ini, untuk mengatakan beliau telah 'dianggap' menerima notis tentang bantahan permulaan dalam permohonan ini adalah amat mengelirukan (lihat ms 13F–H).

(2) Afidavit dan dua afidavit lanjut yang diikrarkan oleh peguam bagi pihak defendan bukanlah penjelasan tentang apa yang berlaku dalam prosiding dalam mana beliau sendiri hadir. Oleh kerana beliau mempunyai pengetahuan persendirian mengenai apa yang berlaku dalam kes ini dari mula lagi, beliau merupakan satu-satunya pihak yang boleh mengesahkan afidavit yang menyokong permohonan kedua (lihat ms 14B–D).

(3) Hakikat semata-mata bahawa peguam bagi pihak defendan mengesahkan afidavit menyokong satu permohonan oleh defendan tidak akan dengan sendirinya menghalang beliau daripada bertindak sebagai peguam dalam kes ini. Peguam jelas kompeten untuk memberi keterangan atas fakta yang mana mereka mempunyai pengetahuan persendirian. Tidak dalam semua kes ia merupakan satu kemungkiran etika profesional untuk peguam mengikrar satu afidavit. Pihak yang membangkitkan bantahan permulaan mesti menyediakan material yang mencukupi untuk menunjukkan bahawa peguam adalah seorang saksi atas isu material. Plaintif telah gagal melaksanakannya (lihat ms 14H–I).

(4) Adalah undang-undang mantap bahawa suatu pihak mstilah menyatakan di bawah perenggan peruntukan yang manakah di bawah A 18 k 19(1)(a) hingga (d) beliau akan mengguna dalam permohonan untuk pembatalan. Ini adalah amat penting kerana tiada keterangan boleh diterima masuk untuk satu permohonan yang dibuat di bawah k 19(1)(a). Maka permohonan pertama boleh dibatalkan. Setelah menyedari hal ini, walaupun pada masa yang lewat ini, defendan tidak dikecualikan daripada meminda permohonan pertama. Peninggalan boleh dipulihkan kerana ia

A cuma berniat menjelas dan membuat permohonan pertama lebih sempurna. Plaintif boleh dipampas dengan secukupnya dengan kos untuk apa-apa prejudis yang dialami (lihat ms 16B–E).

(5) Peruntukan relevan untuk pindaan pliding adalah A 20 k 5 KMT sedangkan untuk satu pindaan permohonan peruntukan relevan adalah A 32 k 2(2) KMT. Dengan itu nas-nas berkaitan dengan pindaan pliding tidak relevan di mana permohonan cumalah untuk meminda satu permohonan (lihat ms 15F–G).]

Notes

For cases on practice of law generally, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1495–1526.

Cases referred to

Chew Chee Sun v Oriental Bank Bhd & Ors Civil Suit No 22–143 of 1994, unreported (refd)

Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor [1988] 3 MLJ 348 (refd)

Khor Cheng Wah v Sungei Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd [1983] 1 MLJ 213 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (d), O 20 r 5, O 32 r 2(2)

Edwards Mathews (*Jayaraman Ong & Co*) for the plaintiff.
Jyotsana Doshi (*Abdullah Zainuddin*) for the defendant.

Zaleha Zahari J: This is an appeal against the decision of the senior assistant registrar ('the SAR') in allowing the application of Perwira Habib Bank Malaysia Bhd (now known as 'Perwira Affin Bank Bhd,' and hereinafter referred to as 'the defendant') to amend its summons in chambers filed on 14 March 1996, ie encl (12).

At the outset of the hearing of the application on 24 February 2000, the plantiff's counsel, Mr Mathews, raised a preliminary objection to the continued presence of Ms Jyotsana Doshi, who had appeared as counsel for the defendant since the inception of these proceedings against the defendant.

After hearing arguments on the preliminary objection, I found the grounds of objection to Ms Doshi's presence as counsel for the defendant to be groundless and unsubstantiated and dismissed the preliminary objection and then proceeded to hear arguments on the appeal on its merits.

Thereafter, after considering the submissions of both counsels, the plaintiff's appeal against the SAR's decision dated 25 September 1999 was

dismissed with costs. The background facts and the reasons for my decision are as follows. A

Background

By writ of summons filed on 26 December 1995 the plaintiff in this case, J Raju a/l M Kerpaya @ Jayaraman a/l M Kerpaya is seeking, inter alia, to set aside a ten year old order, ie an order for sale, together with consequential orders, issued on 24 October 1985 ('the said order for sale') by the honourable Edgar Joseph J in Penang vide High Court Originating Summons No 433 of 1984 (hereinafter refered to as 'the earlier foreclosure proceedings'). It is common ground that the said order for sale was granted on the application of the defendant. B C

Upon service of the writ and statement of claim the defendant duly entered appearance, filed statement of defence on 24 January 1996, which was followed by the plaintiff's reply on 10 February 1996.

The interlocutory applications D

Several interlocutory applications have been filed in this case. It is necessary to set these out as they have a bearing in the making of a considered decision in the appeal before me.

Enclosure (5) E

Before the defendant even its their statement of defence, vide summons in chambers filed on 13 January 1996, ie encl (5), the plaintiff sought an order to stay all proceedings in respect of the said order for sale obtained in the earlier foreclosure proceedings pending the disposal of this civil suit as well as an order to inspect accounts. As to why the plaintiff chose to apply for a stay of the said order for sale obtained in the earlier foreclosure proceedings in this civil suit, and not in originating summons in which it was obtained, ie Penang High Court Originating Summons No 433 of 1984, only the plaintiff can explain. F

Suffice for this court to observe that encl (5), although filed some three years 11 months ago, had not, to date, been disposed of due to diverse reasons, at the instance of the plaintiff, the defendant as well as by the court. G

Enclosure (12)

This application was filed by the defendant on 14 March 1996. By encl (12) the defendant sought to strike out the plaintiff's claim pursuant to O 18 r 19(1) of the Rules of the High Court 1980 ('the RHC') and under the inherent jurisdiction of the court. H

The first return date given by the court for encl (12) was 14 May 1996. This striking out application proved to be extremely contentious. Several affidavits were exchanged between the parties. The plaintiff had also filed a notice to use an affidavit filed in the earlier foreclosure proceedings in opposing this application to strike out! I

A What transpired on 14 May 1996 when both encls (5) and (12) were called up for hearing before Vincent Ng J was this. The minutes of proceedings recorded on that date read as follows:

> By consent lampiran (12) & (5) didengar di hadapan hakim pada hari yang sama. Didengar pada 2 Julai 1996 (bicara). Skeletal written submissions and
B chronology to be filed within two weeks and reply thereto within two weeks separately to separate enclosures.

A perusal of the record shows that submissions were exchanged between the parties in the months of May and June 1996.

The court notes that the next hearing date of 2 July 1996 for the hearing
C of encls (5) and (12) was vacated at the request of the defendant's counsel vide letter dated 25 June 1996 (encl (23) on the ground that she was engaged in the Court of Appeal. Thereafter, there was no development in this file for about two and a half years. This file was dormant until March 1999 when the court issued two notices, ie encls (29) and (29A), both dated 13 March 1999, fixing the hearing of encl (5) before a judge in chambers on
D 15 April 1999, and the hearing of encl (12) before the SAR on 21 April 1999.

Enclosure (36)

Subsequent to the issuance of these two notices of hearing dated 13 March
E 1999 resuscitating encl (5) and encl (12) for hearing, the plaintiff moved back into action.

On 9 April 1999 the plaintiff filed another summons in chambers, encl (36) and an affidavit in support, encl (37). The first return date for encl (36) was 16 July 1999. By this fresh application the plaintiff inter alia
F sought the following rather unusual order:

> Bahawa plaintif dibenarkan kebenaran kependekan ke tarikh memfail untuk memfail dan membaca afidavit oleh J Raju a/l M Kerpaya @ Jayaraman a/l M Kerpaya yang diikrarkan pada 8 April 1999 yang difailkan dalam saman dalam kamar (Lampiran No 5) bertarikh 13 Januari 1996.

G Reverting back to the development of encl (5) and (12), a week later, when the case was called up for the hearing of encl (5) on 15 April 1999, the record shows there were arguments as to whether encl (12) or encl (5) should be heard first. The defendant's counsel was of the view that the striking out action should be disposed of first and sought an adjournment of encl (5). The plaintiff's counsel contended otherwise.

H The court ruling on this issue on that date was that encl (12) should be disposed of first. Enclosure (5) was then adjourned for hearing on 16 July 1999, which date was subsequent to the date fixed for the hearing of encl (12) then.

I Enclosure (40)

The following day, on 16 April 1999, the plaintiff filed yet another summons in chambers, ie encl (40), together with an affidavit in support, ie

encl (42), which was given a return date of 22 June 1999. By this application, the plaintiff sought a similar order as in encl (36), ie:

> Bahawa plaintif dibenarkan kebenaran kependekan ke tarikh memfail untuk memfail and membaca afidavit oleh J Raju a/l M Kerpaya @ Jayaraman a/l M Kerpaya yang diikrarkan pada 14 April 1999 yang difailkan dalam saman dalam kamar (lampiran No 12) bertarikh 14 Mac 1996.

A week later, on 23 April 1999, the plaintiff then issued a notice, encl (46), of his intention to use an affidavit filed in the earlier foreclosure proceedings, ie that affirmed by Tan Kwe Hee affirmed on 3 August 1994.

Enclosure (57)

The failure to state expressly in encl (12) the particular para of O 18 r 19 of the RHC the defendant was relying on in its application to strike out moved the plaintiff to issue a notice on 18 June 1999 to the defendant's counsel of his intention to raise this omission as a preliminary objection and that he would be applying for the striking out application to be struck out in limine.

The position of encl (12) as at July 1999 is that it was scheduled to be heard on 13 July 1999. About four days prior to this hearing date, ie on 9 July 1999, the defendant then filed encl (57), by which application the defendant sought the leave of the court to amend encl (12) by inserting the express para of O 18 r 19(1) of the RHC that it was relying on in its application to strike out, ie the insertion of the words 'paras (b), (c) and (d)'.

The reason given in the affidavit filed in support of the striking out application, that of Ms Jyotsana Doshi affirmed on 2 July 1999 (encl (56)) was that the amendment was necessary so that the summons in chambers is 'lebih lengkap dan terperinci' (ie more complete and detailed). In para 5 and 6 of her affidavit (encl (56)) the defendant's counsel averred to the missing reference of the para of O 18 r 19 of the RHC that the defendant was relying on as a 'typographical' mistake.

This simple application to amend turned out to be contentious as evident from the exchange of affidavits between the parties in this case, ie:

(a) that affirmed by the plaintiff on 6 August 1999 (encl (62));

(b) that affirmed by the defendant's counsel on 20 August 1999 (encl (64));

(c) that affirmed by the plaintiff on 27 August 1999 (encl (66)); and

(d) that affirmed by the defendant's counsel on 7 September 1999 (encl (68)).

The preliminary objection

I would like to deal with the preliminary objection raised by the plantiff's counsel at this stage.

At the outset of the hearing the plaintiff's counsel admitted to not issuing any formal notice to the defendant's counsel of the objection that he

A was about to raise. Be that as it may Mr Mathews was of the view that the failure to give a formal notice was not fatal in the light of what had transpired and Ms Doshi is deemed to have had notice of his intended objection.

Mr Mathews submitted that it was not 'in the interest of justice' and it B was 'in order to preserve the integrity and dignity of this court' that Ms Doshi should not be allowed to continue to represent the defendant in these proceedings and that the defendant should appoint another counsel to represent it. Mr Mathews submitted that there was a real probability of Ms Doshi, as well as this court, being placed in an embarrassing position in the light of the numerous allegations relating to the integrity of Ms Doshi C raised by the plaintiff. He was further of the view that Ms Doshi should have anticipated the points he was raising and that she should have withdrawn as counsel on her own volition and not continue to act as counsel for the defendant.

Mr Mathews then attempted to present and raise facts not held out in D any of the affidavits filed in support of, or in opposition to, the defendant's application to amend. In such a circumstance the court directed Mr Mathews to confine his submission to facts held out by the affidavits filed in support of, or in opposition to, the application in issue.

Ms Doshi's response to the challenge on her continued appearance as counsel for the defendant was this: Firstly, she questioned the bona fide of E the plaintiff's counsel raising this objection at this stage. If indeed the plaintiff's counsel had such a strong objection to her handling the application to amend the defendant's application to strike out, why did he not raise this objection much earlier at the hearing of encl (57) before the 'SAR'? To raise this as an issue for the first time at the appellate stage before F a judge in chambers without giving any prior notice appears to be an attempt on the part of the plaintiff's counsel to further delay these proceedings.

Further, on a point of procedure, if indeed the plaintiff's counsel was desirous of objecting to her continued presence as counsel for the defendant at this stage of proceedings as a preliminary objection, then the plaintiff's G counsel should have given her formal notice of his intention to do so. As the position now stands, she was only put to notice of the plaintiff's objection outside the court room this morning as candidly admitted by the plaintiff's counsel at the commencement of these proceedings. She was caught by surprise and taken aback by the extremely strong objection taken to her continued presence as counsel for the defendant this morning. H

On the plaintiff's counsel's allegation that she is 'deemed' to have had notice of the preliminary objection Ms Doshi drew the court's attention to the fact that the notice referred to was in relation to the affidavit in encl (68), and not in respect of encl (57). By this notice the plaintiff's counsel threatened to refer her to the Bar Council should she not withdraw I encl (68). She had duly responded to the plaintiff's counsel's notice and to date, has heard nothing further from the plantiff's counsel on this issue. In this situation, for the plaintiff's counsel to say that she is 'deemed' to have

had notice of the plantiff's intention to object to her presence as counsel for the defendant as a preliminary issue at the hearing before the court this morning on the basis of her affidavit in encl (57) was therefore extremely misleading.

Addressing the preliminary objection on its merits, Ms Doshi pointed out that encl (57) was but a simple application to amend which was to cure an omission made by the defendant's counsel in the summons in chambers (encl (56)) filed. An examination of the affidavit filed by her in support of the application, as well as the other two further affidavits, encls (64) and (68), would show that they were but an explanation as to what had transpired in proceedings where she herself was personally present. In these circumstances as she had personal knowledge as to what had transpired in this case from its inception she was the only person who could affirm the affidavit in support of the application to amend. The plaintiff's counsel's objection to her continued presence and attempt to disqualify her at this stage of proceedings were clearly but to deprive this court of being fully appraised of the facts and to be informed as to what actually transpired. That the true intention of objecting to her continued presence as the defendant's counsel was to further delay the disposal of these and other pending proceedings. She therefore urged this court to dismiss the plaintiff's preliminary objection.

Findings on the preliminary objection

Firstly, on the failure to give notice to the defendant's counsel of the preliminary objection. It is certainly good practice for a party intending to raise any preliminary point to give prior notice in writing so that that other party would not be taken by surprise. In the present case, notwithstanding the fact that she was taken by surprise by the objection, the defendant's counsel did not seek an adjournment to be given time to respond, in the light of her contention that this was but an attempt to delay the proceedings. Neither did she urge this court not to entertain the preliminary objection by reason of the failure to issue such a notice. As a matter of fact, it would appear that the defendant's counsel was able to answer and meet all of the points raised by the plaintiff's counsel on the preliminary issue.

The court clearly has an inherent discretion to ensure that due administration of justice is not in any way embarrassed. The question here is whether the plaintiff has furnished any substantive reason warranting the court's intervention. For this court to intervene the plaintiff must provide sufficient material to indicate that counsel in question is a witness on a material issue.

On the facts of this case I am of the considered opinion that the mere fact that Ms Doshi had affirmed the affidavit in support to amend would not per se disqualify her from appearing as counsel in this case. Counsel engaged in a case are in law clearly competent to testify to facts in respect of matters of which they have personal knowledge. It is not in all cases a breach of professional ethics for counsel retained in a case to affirm an affidavit in respect of matters that had transpired in the conduct of a specific matter.

A I am of the considered opinion on the material presented before the court that the plantiff has not provided sufficient material warranting the court's intervention. I hold the objection to Ms Doshi's presence as counsel for the defendant in this appeal before me to be unwarranted and appears to be an attempt to delay and protract these proceedings. The preliminary objection is accordingly dismissed.

B I then proceeded to hear the arguments on the appeal on its merits.

Arguments and findings on merits

The plaintiff's counsel submitted that the delay of three years that had C occurred in the filing of the application to amend was inordinate and had not been explained by the defendant's counsel. Enclosure (56) also did not state when the defendant's counsel realized this 'typographical' error. He submitted that the reasons given by the defendant's counsel were 'lies' and not bona fide.

D Mr Mathews was of the view that the real reason for the filing of the application in encl (57) was but a tactical move on the part of the defendant's counsel to avoid encl (12) from being struck out. He further submitted that in the light of the fact that the defendant's counsel had failed to furnish a reasonable explanation before the court, the more appropriate action for the defendant to take was to withdraw the said application and to E file a fresh application to strike out. Reliance was placed on the cases of *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223, *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd* [1983] 1 MLJ 213, *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348 and *Chew Chee Sun v Oriental Bank Bhd & Ors* Civil Suit No 22–143–94. He then urged this court to allow the appeal with costs.

F The defendant's counsel's arguments in reply were these: Ms Doshi submitted that the authorities cited by the plaintiff's counsel were not relevant as they all related to amendment of pleadings which is not applicable to the present application.The court's attention was drawn to encl (57) which clearly relates to an amendment to a summons in chambers G of which O 32 r 2(2) of the RHC applies, whereas in the case of an amendment to a writ or pleadings, the provision of O 20 r 5 of the RHC is applicable.

The purpose of the amendment sought by the defendant's counsel was but to explain the real controversy in the application to strike out. According to her the omission and failure on the part of the defendant's H counsel to state the actual paragraphs that the defendant was relying on in O 18 r 19 of the RHC in encl (12), which encl (57) sought to remedy, was a curable amendment so that the plaintiff would be put to notice as to the actual ground that the defendant is relying on and encl (12) could then be heard on its merits. On the issue of delay she was of the view that that was I not material as long as the application was filed before its hearing.

The defendant's counsel's further submission was that the plaintiff had not been prejudiced by this omission which the defendant seeks to correct

and can be adequately compensated in costs. The SAR was, according to her, in the present circumstances, right in allowing the amendment and in directing that the costs of the application be borne by the defendant and payable to the plaintiff. In these circumstances the defendant accordingly prayed that the appeal be dismissed with costs.

It is settled law that a party must state which particular para of O 18 r 19 of the RHC that it is relying on in an application to strike out as no affidavit evidence is admissible in respect of an application if it is grounded on para (a). The failure to do so by the defendant in encl (12) clearly would render the defendant's application liable to be struck out. It is clear to this court that upon realizing this, be it at the eleventh hour, the defendant filed encl (57) to remedy this situation. The issue here is whether the defendant is to be precluded from curing this omission by reason of the time frame that had lapsed from the date of its filing and by reason of the fact that the plaintiff's counsel had already issued a notice of his intention to raise this omission as a preliminary objection?

I hold not. I am in agreement with the defendant's counsel's submission that this omission is a curable one as it only sought to clarify and make the striking out application more complete and the plaintiff was put to notice as to the express para of O 18 r 19 of the RHC that the defendant was relying on such that the application to strike out can then proceed to be heard on its merits. I am in agreement that the plaintiff can be sufficiently compensated in costs.

In these circumstances, the plaintiff's appeal is accordingly dismissed with costs.

Appeal dismissed.

Reported by Andrew Christopher Simon